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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS FIFTY-SECOND SESSION

Rapporteur: Mr. Victor Rodríguez-Cedeño

CHAPTER V

DIPLOMATIC PROTECTION

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### A. Introduction

1. The Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>1</sup> In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.<sup>2</sup> The Working Group submitted a report at the same session which was endorsed by the Commission.<sup>3</sup> The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.<sup>4</sup> The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.
2. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.
3. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.
4. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.<sup>5</sup> At the same session, the Commission established an open-ended Working

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<sup>1</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, para. 249 and annex II, addendum 1.

<sup>2</sup> *Ibid.*, *Fifty-second Session, Supplement No. 10 (A/52/10)*, chap. VIII.

<sup>3</sup> *Ibid.*, para. 171.

<sup>4</sup> *Ibid.*, paras. 189-190.

<sup>5</sup> A/CN.4/484.

Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.<sup>6</sup>

5. At its fifty-first session, in 1999, Mr. Bennouna was elected as a judge to the International Criminal Tribunal for the Former Yugoslavia. The Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic.<sup>7</sup>

B. Consideration of the topic at the present session

6. At the present session, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission considered the first report contained in document A/CN.4/506 and Corr.1 at its 2617th to 2620th, 2624th to 2627th and 2635th meetings, from 9 to 12 May, 19 May to 25 May and on 9 June 2000. Due to the lack of time, the Commission deferred consideration of A/CN.4/506/Add.1 to the next session.

7. At its 2624th meeting, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on articles 1, 3 and 6. The report of the Informal Consultations is reproduced in paragraph 89 below.

8. The Commission considered the report of the Informal Consultations at its 2635th meeting and decided at the same meeting to refer draft articles 1, 3 and 4 to 8 to the Drafting Committee together with the report of the Informal Consultations.

1. An overview of the approach to the topic

9. Introducing his first report, the Special Rapporteur stated that taking into account that the Commission had already discussed the approach and the general issues involved in the topic in the context of the preliminary report of the former Special Rapporteur and in the context of two Working Groups dealing with the topic in 1997 and 1998, and for practical reasons he had decided to move directly to proposals on the articles as this course was more conducive to

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<sup>6</sup> The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 108.

<sup>7</sup> *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)*, para. 19.

focused discussion and to reaching conclusions. However, he wished to explain a few general issues which run through the articles he had proposed and could be discussed in the context of those draft articles.

10. First, he had taken the view that diplomatic protection might be employed as a means to advancing the protection of human rights. He would submit therefore that diplomatic protection remained an important weapon in the arsenal of human rights protection. As long as the State remained the dominant actor in international relations, the espousal of claims by States for violation of the rights of their nationals remained the most effective remedy for human rights protection. Instead of seeking to weaken that remedy by dismissing it as a fiction that had outlived its usefulness, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. That was the philosophy on which his report was founded.

11. Second, he was not persuaded that diplomatic protection had become obsolete because of various dispute settlement mechanisms to which individuals had now been given access. While individuals were participants in the international legal system and have rights under international law, their remedies remain limited.

12. Third, he had decided deliberately to put forward the most controversial issues involved in the topic early on in order to seek guidance from the Commission and to settle them before advancing any further. This applied in particular to the issue of the use of force in the exercise of diplomatic protection, discussed in the context of article 2, and to the question whether there is a duty on the part of States to exercise diplomatic protection, discussed in the context of article 4.

13. With regard to the structure, he stated that the eight draft articles proposed in document A/CN.4/506 fell into two groups. Of the first group (arts. 1 to 4), articles 1 and 3 were largely foundational, whereas articles 2 and 4 were particularly controversial. Articles 5 to 8, the second group, were equally controversial, but all dealt with issues relating to nationality.

## 2. Article 1<sup>8</sup>

### (a) Introduction by the Special Rapporteur

14. The Special Rapporteur explained that article 1 sought to be not a definition, but rather a description, of the topic. Nor did the article attempt to address the subject of functional protection by an international organization - a matter briefly touched upon in paragraph 38 of the report, and one which perhaps had no place in the study, raising, as it did, so many different issues of principle. The doctrine of diplomatic protection was clearly closely related to that of State responsibility for injury to aliens. Indeed, the Commission's initial attempt to draft articles on State responsibility had tried to cover both the principles of State responsibility as currently formulated and the subject of diplomatic protection. The idea that internationally wrongful acts or omissions causing injury to aliens engaged the responsibility of the State to which such acts and omissions were attributable had gained widespread acceptance in the international community by the 1920s. It had been generally accepted that, although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien's State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment due to aliens.

15. The term "action" in article 1 presented some difficulties. Most definitions of diplomatic protection failed to deal adequately with the nature of the actions open to a State exercising diplomatic protection. The Permanent Court of International Justice had appeared to distinguish between "diplomatic action" and "judicial proceedings", a distinction repeated by the International Court of Justice in the *Nottebohm* case and by the Iran-United States Claims Tribunal in *Case No. A/18*. In contrast, legal scholars drew no such distinction, and tended to

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<sup>8</sup> Article 1 reads as follows:

#### Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

See A/CN.4/506, p. 11.

use the term “diplomatic protection” to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, in the final resort, the use of force.

(b) Summary of the debate

16. The report of the Special Rapporteur was found to be stimulating and well researched and was welcomed for discussing, in a direct and open manner, the most controversial issues the Commission might have to face in connection with diplomatic protection. The report raised a number of important issues in the context of article 1 which also affected the approach to the topic.

17. It was noted that the Special Rapporteur accorded great importance in his report to diplomatic protection as an instrument for ensuring that human rights were not infringed. However, it was suggested that this issue may have been over-emphasized. It was not immediately obvious that use was made of diplomatic protection when a State raised human rights issues for the benefit of its nationals. Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of context when human rights were invoked. States were mainly concerned with protecting the human rights of their own nationals, however, and while the rules of general international law on human rights did not for most purposes distinguish between persons protected according to their nationality, States did tend to be more protective where their own nationals were concerned. Hence, it could safely be suggested that the concept of diplomatic protection extended to the protection of the human rights of one’s nationals. There were, however, difficulties. The International Court of Justice in its famous dictum in the *Barcelona Traction* case, indicated that only the State of nationality could intervene in cases of diplomatic protection, but in human rights cases, any State could do so.

18. It was further noted that the word “action” in article 1 created difficulties. Diplomatic protection was a long and complex process and it usually involved two stages. First, when a State received a complaint from an individual, it examined the complaint to determine how serious it was and whether or not it was lawful. That first preparatory, investigatory stage did not constitute diplomatic protection. Only once the Government decided to make a claim on



behalf of its national to the Government that had allegedly failed to apply to that person certain rules of international law, did diplomatic protection come into operation.

19. In this context, views differed as to whether diplomatic protection applied to actions taken by a Government to prevent injury to its national (that is before the occurrence of a wrongful act) or only to wrongful acts of the State that had already occurred. Some members of the Commission supported the latter view, that is that diplomatic protection was for an internationally wrongful act of another State which had caused injury to a national of another State. An involvement of the State of nationality in negotiations with other States with a view to preventing injury to their nationals did not fall within the scope of diplomatic protection as that notion is understood in the classical sense. Some members of the Commission took a different view. They stated that in practice States may take up concerns of their citizens with regard to actions or measures which might in future cause injury to those nationals. The involvement of the State of nationality at this stage should also be characterized as diplomatic protection. At any rate diplomatic protection was not an “action” as such; it was the setting in motion of a process by which the claim of a natural or legal person was transformed into an international legal relationship. In that purely technical sense, diplomatic protection was one of the means of making the international responsibility of the State effective.

20. With regard to the nature of diplomatic protection, two different views were expressed. According to one view, diplomatic protection was the right of the individual. According to this view, the constitution of a number of States, particularly Eastern European States, upheld the right of nationals to diplomatic protection; a trend compatible with the development of the protection of human rights in contemporary international law. According to another view, supported by many members of the Commission, diplomatic protection was a discretionary right of the State. A State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not to the State itself but to its national, who had suffered the injury caused by that wrongful act. However, there was no obligation on the State to present a claim on behalf of an injured national. The constitutional obligation to extend diplomatic protection to nationals had no bearing on international law with regard to the institution of diplomatic protection.

21. Concerning the definition of injury, there was general agreement that article 1 should be drafted to show that diplomatic protection is concerned with injury under international law, not injury under domestic law. As to whether the breach of domestic law entailed the right to exercise diplomatic protection, a compromise solution was suggested according to which if domestic law was violated in respect of an alien and no redress was provided in the national courts, that should give rise to injury under international law. This suggestion, however, was not welcomed by some members since the problem under diplomatic protection was not denial of due process, but exhaustion of domestic remedies, which was a broader issue than denial of due process. Diplomatic protection could be triggered even in the absence of denial of due process, and to focus on denial of justice would involve consideration of primary rules.

22. It was noted that because of the relationship between State responsibility and diplomatic protection, the latter should use terms consistently with the former. It was also stated that the concept of “diplomatic protection” should be clarified so as to avoid any confusion between it and the notion of protection, privileges and immunities of diplomats and matters dealing with consular and diplomatic representation and functions.

(c) Concluding remarks by the Special Rapporteur

23. The Special Rapporteur stated that article 1 had not given rise to any major objections. However, doubts had been expressed about the language employed, in particular the word “action”, which had been construed differently by different members. It had been suggested that the matter should be given closer attention. Some members had also suggested that the language of article 1 should be brought into line with that of the articles on State responsibility.

24. Interesting comments had been made about the need for a wrongful act to have been committed before diplomatic protection could be exercised. However, attention was drawn by some members, to the possibility of a potentially wrongful act, such as a draft law providing for measures which could constitute a wrongful act. That question, too, would have to be considered further.

3. Article 2<sup>9</sup>

(a) Introduction by the Special Rapporteur

25. The Special Rapporteur explained that article 2 raised two highly controversial questions: first, the perennially topical question whether forcible intervention to protect nationals was permitted by international law; and second, whether the matter fell within the sphere of diplomatic protection. He had been reluctant to devote too much space to the matter in his commentary, particularly as there was a prospect of article 2 being rejected. He recalled that the previous Special Rapporteur, in his preliminary report in 1998, had declared without qualification that States might not resort to the threat or use of force in the exercise of diplomatic protection. He therefore felt obliged not to ignore the subject in his report.

26. He stated that Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force. The only exception, as far as unilateral intervention was concerned, was embodied in Article 51 of the Charter, on the right of self-defence. The right of self-defence in international law had been formulated well before 1945. It was generally accepted that the wide scope of that right included both anticipatory self-defence and intervention to protect nationals. Article 51 made no reference to them, but only to cases in which an armed attack occurred. A considerable scholarly debate had arisen among various authors taking diverse positions on the

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<sup>9</sup> Article 2 reads as follows:

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Ibid., p. 16.

issue. The decisions of international tribunals and political organs of the United Nations provided little guidance on the subject. Courts had generally avoided the topic. Hence, the law was uncertain. However, the right had been greatly abused in the past and still lent itself to abuse. Consequently, if it was to be included, it should be narrowly formulated. In attempting to do that, he proposed article 2 which he believed reflected State practice more accurately than an absolute prohibition on the use of force. The latter was difficult to reconcile with actual State practice. So was the broad right to intervene, which was impossible to reconcile with the protests made by the injured State and third States in the case of an intervention to protect nationals.

27. In paragraph 60 of the report he pointed out that the study did not deal with humanitarian intervention. He understood that article 2 would provoke considerable debate. But he would find it helpful to have a decision on the subject at the outset so as to preclude the issue arising again when the subject matter had already been debated at length by the Commission. The report contained sufficient material for a decision to be taken as to whether a provision of that nature should be included in the draft.

(b) Summary of the debate

28. Two different views were expressed with respect to article 2.

29. According to one view, article 2 was objectionable as it did not include a categorical rejection of the threat or the use of force in the exercise of diplomatic protection. The draft articles should not include any exceptions that might cast doubts on that prohibition. Circumstances exempting a State from responsibility for an act of force might possibly encompass imminent danger or a state of necessity, matters which should be regulated by the draft on State responsibility. Nevertheless, in the context of diplomatic protection, any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable. As the Special Rapporteur had pointed out, since the formulation of the Drago doctrine in 1902 and the Porter Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, the prohibition of the threat or use of force had been one of the most notable aspects of the development of the right of diplomatic protection, which had certainly furthered the development of general international law. It had culminated in the rule embodied in Article 2, paragraph 4, of the Charter of the United Nations. In addition taking account of the historic use of force under the banner of diplomatic protection, it was essential to maintain the first part of the opening clause of article 2 which read “the threat or use of force is prohibited as

a means of diplomatic protection” somewhere in the draft, as it was a significant element in the development of customary international law on diplomatic protection. The remainder of the wording proposed by the Special Rapporteur, as from “except in the case of ...” should, however, be expunged. It should be remembered that the text on State responsibility, article 50 (a), on countermeasures, adopted on first reading, expressly forbade a State to resort by way of countermeasures to the threat or use of force as prohibited by the Charter. Nevertheless any attempt to delete the first part of the first sentence in article 2 as drafted by the Special Rapporteur might be misinterpreted at a time when there was a growing tendency to use force in exceptional cases.

30. In the context of the view expressed in the previous paragraph, it was also stated that the Special Rapporteur’s proposal was also at variance with another crucial principle of international law, that of non-intervention in the internal affairs of States as expressed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which stipulated that no State or group of States had the right to intervene, directly or indirectly, for any reason whatsoever - and thus including the protection of nationals - in the internal or external affairs of any other State and that consequently, armed intervention and all other forms of interference or attempted threats against the personality of a State or against its political, economic or cultural elements were in violation of international law.

31. According to another view, the question of the use of force was not part of the topic of diplomatic protection and lay outside the Commission’s mandate. Diplomatic protection was related to the law of responsibility and was essentially concerned with the admissibility of claims. The Commission could not possibly deal with all of the mechanisms, some of them very important in themselves, by which protection could be given to individuals who had complaints against States. Those mechanisms comprised a whole range of actions, including peacekeeping, consular activities and so forth. In addition, the use of force to protect nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations. The actions referred to by the Special Rapporteur might be justified or excused on the basis of other principles of international law, such as necessity, but like humanitarian intervention, those were controversial issues and had no bearing on the issue of diplomatic protection.

32. Members supporting the first view found it inconceivable that States should be given a legal basis, within the framework of diplomatic protection, that would allow them to use force other than in self-defence, as provided for in Article 51 of the Charter of the United Nations. The notion of self-defence could not be stretched, in their view, to cover the protection of the nationals of a State in a foreign country. However, members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in law and that States would take forcible action if their nationals' lives were at stake. Members who took the view that the issues discussed in article 2 had no place in the topic of diplomatic protection and should therefore be deleted, did not agree with the retention of the first part of the opening clause since in their view the use of force to protect nationals was a form of self-help distinct from diplomatic protection at any level, either legal or factual. For that reason, even the retention of that part of article 2 would create confusion.

33. Another view advanced was that the articles should make it clear that diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had been threatened with or had suffered injury in another State. In that way, force was excluded without recourse to the wording in the first sentence of draft article 2. Thus a constructive solution worth considering might consist in deleting the term "action" from article 1 and instead stating that diplomatic protection meant the initiation of a procedure for the peaceful settlement of a dispute.

(c) Special Rapporteur's concluding remarks

34. As far as article 2 was concerned, it had to be acknowledged that the use of force was construed by some States as the ultimate form of diplomatic protection. Support for this position was to be found in the literature both before and after the Second World War. It was a fact that States had, on a number of occasions, forcibly intervened to protect their nationals, arguing that they were exercising the right to diplomatic protection and that they would continue to do so in future. In all honesty, he could not, like his predecessor, contend that the use of force was outlawed in the case of the protection of nationals. He had, however, attempted to subject such intervention to severe restrictions. Some members had rejected draft article 2 on the grounds that the Charter of the United Nations prohibited the use of force to protect nationals absolutely and that such use was justified only in the event of an armed attack. However, most members of the Commission had not taken a firm position on the Charter provisions, preferring to reject

article 2 on the ground that it simply did not belong to the subject of diplomatic protection. The debate had revealed that there was no unanimity on the meaning of the term “diplomatic protection”, but it had also shown that diplomatic protection did not include the use of force. It was thus quite clear that draft article 2 was not acceptable to the Commission.

#### 4. Article 3<sup>10</sup>

##### (a) Introduction by the Special Rapporteur

35. The Special Rapporteur stated that the question whether the right of protection was one pertaining to the State or to the individual was addressed in article 3. At the present stage, it was sufficient to say that historically that right was vested in the State of nationality of the injured individual. The fiction that the injury was to the State of nationality dated back to the eighteenth century and Vattel, and had been endorsed by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* and the *Panevezys-Saldutiskis Railway* cases, and also in the *Nottebohm* case.

36. Article 3 was relatively uncontroversial. It raised the issue of whose right was asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. The traditional view that the injury was caused to the State itself had been challenged on the grounds that it was riddled with internal inconsistencies. As he had already pointed out, the doctrine had been accepted for centuries and had been endorsed by the Permanent Court of International Justice and by the International Court of Justice.

37. Diplomatic protection, albeit premised on a fiction, was an accepted institution of customary international law that continued to serve as a valuable instrument for the protection of human rights. It provided a potential remedy for the protection of millions of aliens who had no access to remedies before international bodies and a more effective remedy for those who had access to the often ineffectual remedies embodied in international human rights instruments.

38. Article 3 attempted to codify the principle of diplomatic protection in its traditional form. It recognized diplomatic protection as a right attached to the State, which the State could

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<sup>10</sup> Article 3 reads as follows:

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Ibid. p. 22.

exercise at its discretion, subject to article 4, whenever a national was unlawfully injured by another State. The right of diplomatic intervention of the State of nationality was not limited to instances of large-scale and systematic human rights violations, nor was the State obliged to refrain from exercising that right when the individual enjoyed a remedy under human rights or foreign investment treaties. In practice, a State would probably refrain from asserting its right when the person did have an individual remedy, or it might join the individual in asserting his right under the treaty in question. In principle, according to article 3, a State was not obliged to exercise such restraint, as its own right was violated when its national was unlawfully injured.

(b) Summary of the debate

39. The proposition in article 3 was in principle found to be acceptable but a number of difficulties were found with its formulation. The article adhered closely to the traditional doctrine of diplomatic protection with the core of article 3 contained in the words “on behalf of a national unlawfully injured by another State”. Members suggested it would be more appropriate to replace the final phrase with the words “injured by the internationally wrongful act of another State”, which would have the advantage of keeping the subject matter within its proper bounds, namely, that of international responsibility. More importantly, in terms of traditional theory, it was not the individual who was injured, but the State which suffered damage in the person of its national. That was where the traditional fiction lay and this should be maintained consistently in the draft articles.

40. It was stressed that the very welcome step in international law of recognizing direct individual rights, in the context either of the protection of human rights or the protection of investments, had not undermined the traditional doctrine of diplomatic protection. Diplomatic protection was a discretionary power of the State under existing positive international law - and that should perhaps be stated more explicitly. The question arose whether the time had come to confine the State’s discretionary power within narrower bounds. The view was also expressed that it was not appropriate to keep the phrase declaring that the right to exercise diplomatic protection was of a discretionary nature, since some might argue that such language precluded States from enacting internal legislation that obliged States to protect their nationals.

(c) Concluding remarks by the Special Rapporteur

41. In article 3, he had proposed that the Commission should adopt the traditional view deriving from the judgement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, according to which diplomatic protection was a right of the State,



which did not act as the agent of its national. Some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the cause of the breach of international law. He believed that the idea was implicit in the draft article, but agreed that it could be made more explicit.

5. Article 4<sup>11</sup>

(a) Introduction by the Special Rapporteur

42. The Special Rapporteur stated that article 4 dealt with another controversial question and was a proposal *de lege ferenda* in the field of progressive development, not codification. According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its national. It was under no obligation to do so. Consequently, a national injured abroad had no right to diplomatic protection under international law. Yet, in the opinion of some scholars, that position was an unfortunate feature of international law and current developments in international human rights law required that a State be under some obligation to accord diplomatic protection to an injured individual. The

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<sup>11</sup> Article 4 reads as follows:

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.
2. The State of nationality is relieved of this obligation if:
  - (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;
  - (b) Another State exercises diplomatic protection on behalf of the injured person;
  - (c) The injured person does not have the effective and dominant nationality of the State.
3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Ibid., p. 27.

matter had been discussed in the Sixth Committee, where most speakers had expressed the view that the State had absolute discretion whether to grant diplomatic protection. Nevertheless, some speakers had argued to the contrary.

43. State practice in that field was interesting. Many States had Constitutions indicating that the individual did have a right to diplomatic protection. Some Constitutions, especially those of Eastern European countries, contained wording to the effect that the State had to protect the legitimate rights of its nationals abroad or that the nationals of the State should enjoy protection while residing abroad. He did not, however, know whether those rights were enforceable under the municipal law of those countries or were simply intended to ensure that a national injured abroad had the right of access to the State's consular officials.

44. Paragraphs 89 to 93 described the restrictions that should be imposed on that right. First, it was a right that should be limited to the violation of *jus cogens* norms. Second, the national State should have a wide margin of appreciation and should not be compelled to protect a national if its international interests dictated otherwise. Third, a State should be relieved of that obligation if the individual had a remedy before an international tribunal. Fourth, a State did not have that obligation if another State could protect an individual with dual or multiple nationality. Finally, he had put forward the idea that a State should be under no obligation to protect a national who had no genuine or effective link with the State of nationality, that being an area where the *Nottebohm* test might apply. He was therefore bringing article 4 to the Commission's attention in the full realization that it was an exercise in progressive development. Again, the Commission should decide at an early stage whether the proposal was too radical.

(b) Summary of the debate

45. Some members of the Commission expressed concern about article 4 which they found to be *de lege ferenda* and not supported by evidence in State practice. The constitutional provisions mentioned in paragraphs 80 and 81 of the report of the Special Rapporteur provided no evidence of *opinio juris*. There were not very many modern writers who thought that diplomatic protection was a duty of the State and the conclusion reached in paragraph 87 that there were "signs" in recent State practice of support for that viewpoint was an optimistic assessment of the actual materials available.

46. In the same vein, it was stated that article 4 went much too far in establishing a duty for the State to exert diplomatic protection in certain circumstances, while not indicating to whom the duty was owed. It might be to the individual, but because reference had also been made to

peremptory norms, the question arose as to whether the duty was owed to the international community as a whole. It was stated that diplomatic protection was a sovereign prerogative of the State, exercised at its discretion. National legislation at best spelled out the objectives of State policy in terms of affording protection to a State's nationals abroad, but failed to establish binding legal provisions.

47. It was stated that this article like articles 1 and 3 raised the question of human rights. Diplomatic protection was clearly not recognized as a human right and could not be enforced as such. It was stressed again that a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. In addition, in view of the lack of clear understanding of the meaning and the scope of "*jus cogens*", the article created great difficulties. In accordance with this view, the Commission should confine itself to the strictly technical concept of the institution of diplomatic protection and should not venture beyond its mandate.

48. It was further noted that the articles set forth a "legal duty" for a State to exercise diplomatic protection but that that duty was limited to when such a request was made by the injured person. Therein lay a contradiction: if the State had a duty, then it had to perform it - otherwise it was committing a wrongful act. In article 4, the "request" from the injured persons was linked exclusively to a grave breach of *jus cogens*, but that formulation radically diminished the scope of the right to diplomatic protection. It implied that a State was obliged to intervene only when *jus cogens* was involved. The intention was perhaps that, when a rule of *jus cogens* was breached, a State should intervene regardless of the circumstances, and indeed more effectively, dutifully and readily than in other situations. This formulation contradicted the principles of State responsibility under which, if *jus cogens* was affected, not only the State of nationality, but all States, had the right and the duty to protect the individual.

49. Another question raised in the context of this article was the extent to which the individual could pursue his or her own claims and whether the right to diplomatic protection could be exercised simultaneously. The precise point at which the State should exercise the right of diplomatic protection, and if it did, the extent to which the individual continued to be a player

in the game, needed further attention. The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens suggested that the State's claim should be given priority. Did that mean that the national's claim would no longer be addressed, or if it was, that it would no longer be the focus of the resolution of the claim? Again, the interrelationship of two claims that could run concurrently was not made clear.

50. Some other members of the Commission took a less critical view of article 4. In their view, the article basically stated that, in the event of a grave breach of an obligation of crucial importance for the safeguarding of the fundamental interests of the international community as a whole, a State could not remain passive; i.e. if genocide was committed somewhere or if a State systematically resorted to torture or racial discrimination as a means of governance, other States could not stand idly by. But that issue was also not one of diplomatic protection. It was a far more general issue and one with which the members of the Commission were familiar, since it related to international crimes. In such circumstances, States not only had the right, but also the duty to act, although there was still no justification for the use of force. However, that did not mean that diplomatic protection should serve as the instrument for such action, because it was not the rights and interests of nationals alone that were to be endorsed, but those of the international community as a whole. The issue came not under diplomatic protection, but under the far broader topic of State responsibility - and more particularly under article 51 of the draft articles on State responsibility adopted on first reading.

(c) Concluding remarks by the Special Rapporteur

51. The Special Rapporteur recognized that he had introduced article 4 *de lege ferenda*. As already indicated, the proposal enjoyed the support of certain writers, as well as of some members of the Sixth Committee and of the International Law Association; it even formed part of some Constitutions. It was thus an exercise in the progressive development of international law. But the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more *opinio juris* before it could be considered.

6. Article 5<sup>12</sup>

(a) Introduction by the Special Rapporteur

52. The Special Rapporteur said that article 5 in essence examined the principle stated in the *Nottebohm* case, namely, that there should be an effective link between the State of nationality and the individual for the purpose of the exercise of diplomatic protection. The question was whether that principle accurately reflected customary law and whether it should be codified. The *Nottebohm* case was seen as authority for the position that there should be an effective link between the individual and the State of nationality, not only in the case of dual or plural nationality, but also where the national possessed only one nationality. Two factors might, however, limit the impact of the decision in the case and make it an atypical decision. First, doubts remained about the legality of Liechtenstein's conferral of nationality on Nottebohm under its domestic law. Secondly, Nottebohm had certainly had closer ties with Guatemala than with Liechtenstein. He therefore believed that the International Court of Justice had not purported to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It had carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala and had therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State other than Guatemala.

53. With regard to the application of the principle, little information on State practice was available and academic opinion was divided. Acceptance of the principle would seriously undermine the scope of diplomatic protection because in the modern world, as a result of globalization and migration, many people who had acquired the nationality of a State by birth or descent had no effective link with that State. That was why he thought that the genuine link principle must not be applied strictly and that a general rule should not be inferred from it. His proposed draft article 5 therefore stated that "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization." It drew on two

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<sup>12</sup> Article 5 reads as follows:

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

fundamental principles that governed the law of nationality. First, a State's right to exercise diplomatic protection was based on the link of nationality between it and the individual; secondly, it was for each State to determine under its own law who its nationals were. It also took account of the fact that, far from being absolute, the right of a State to exercise diplomatic protection on behalf of a national was a relative one, as demonstrated by doctrine, case law, international custom and the general principles of law (paras. 95 to 105 of the report). Birth and descent were deemed to be satisfactory connecting factors for the conferment of nationality and the recognition of nationality for the purposes of diplomatic protection. The same was true, in principle, for the conferment of nationality through naturalization, whether automatically by operation of law in the cases of marriage and adoption or on application by the individual after fulfilling a residence requirement. On the other hand, international law would not recognize fraudulently acquired naturalization, naturalization conferred in a discriminatory manner or naturalization conferred in the absence of any link whatsoever between the State of nationality and the individual. In that case, abuse of right on the part of the State conferring nationality would render the naturalization *mala fide*. There was, however, a presumption of good faith on the part of the State, which had a margin of appreciation in deciding upon the connecting factors that it considered necessary for the granting of its nationality.

(b) Summary of the debate

54. It was stated that the report contained a great deal of helpful material, especially on the relevant jurisprudence and the decisions adopted in specialized jurisdictions like the Iran-United States Claims Tribunal and the United Nations Compensation Commission (established after the Kuwait-Iraq conflict). However, article 5, which based the right of diplomatic protection on nationality, did not take account of certain political and social realities. For example, in many traditional societies, no provision was made for the registration of births and, in such societies, large numbers of illiterate people would be hard pressed to prove their nationality. There was also the case of victims of war and refugees who crossed borders precipitately and generally without travel documents and who were able to provide oral evidence only of their State of origin. For such people, to demand proof of nationality, particularly documentary proof, was clearly meaningless. In that sense, the principle of "effective nationality" was useful in providing a basis for the evidence of nationality that would otherwise not be available. However, the position of the Special Rapporteur on this point seemed to be a little unclear. After taking the prudent position in his comments on article 5 (para. 117) that

“The genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of people from the benefit of diplomatic protection”, he then went back to that principle in the commentary to articles 6 and 8, giving it a large and positive role. In State practice, there was constant reference to residence, not nationality, as the connecting factor that should be taken into consideration in the settlement of disputes. In the real world, residence would provide a basis for diplomatic protection which would otherwise be impossible to prove by normal documentation.

55. Some members insisted that the right of diplomatic protection should not be linked too much to nationality. Today, with increased frequency, nationals establish residence abroad. The place of residence, therefore, created a link with the host State that was just as effective as nationality. Even if that was a step beyond traditional doctrine, it was a fact of modern-day life that the Commission should take into account. In the consideration of articles 5 to 8, residence should be considered not just as an accessory factor, but as an actual linking factor.

56. The view was also expressed, however, that the importance of “habitual residence”, as some members had suggested, should not be overemphasized in the context of diplomatic protection. Otherwise the question would arise as to whether a person’s habitual residence in a State would give that State the right to exercise diplomatic protection even if that person possessed another nationality *jure soli* or *jure sanguinis* or through bona fide naturalization. The situation would be different if the person concerned was stateless or a refugee, an issue that was addressed in article 8. The other question that would arise was whether a State whose nationality a natural person had acquired through *jus soli*, *jus sanguinis* or naturalization lost the right to diplomatic protection if the person concerned habitually resided in another country. According to the members holding this view the answer to these questions was in the negative, as otherwise habitual residence would become the natural enemy of diplomatic protection.

57. The comment was made that while nationality was relevant to the topic, it was not the core of the topic. Article 5 did not attempt to provide comprehensive coverage of the rules of international law concerning nationality. But it would provide a basis for a State to challenge another State’s conferral of nationality on an individual. The Special Rapporteur had rightly noted the sensitivity of States to any suggestion of impropriety in the exercise of what they regarded as their sovereign prerogative: that of granting nationality to individuals. It would, accordingly, be advisable to follow the safe course taken by the International Court of Justice in the *Nottebohm* case and to assume that States were free to grant nationality to individuals. The

question of whether a given individual had or did not have the nationality of a certain State was one that implied the application of that State's legislation and was best left to the State's own determination. According to the *Nottebohm* judgment, the way to approach the nationality requirement was to allow other States, if they so wished, to challenge the existence of an effective link between a State and its national. It was noted that the Special Rapporteur had correctly pointed out, that there were few examples in State practice of challenges to the effectiveness of nationality. There were even fewer examples, however, of States challenging the way in which nationality had been granted by another State. The number of cases that illustrated one or another approach was not decisive: rather, it had to be ascertained whether States to which a claim was presented felt entitled to use lack of effectiveness as an objection.

58. If the Commission retained the effectiveness test, it was pointed out, it should introduce some restrictions so as to make it workable. It should consider whether the lack of effectiveness of an individual's nationality was open to challenge by any other State, or whether it was only open to a State that had the most significant links with the individual to contend that there were no genuine links with the claimant State. In the *Barcelona Traction* case which concerned a corporation, not an individual, the International Court of Justice had nonetheless referred to the *Nottebohm* test. Although it had not endorsed that test, the Court had considered whether it applied in respect of Canada and had concluded that there were sufficient links between *Barcelona Traction* and Canada. On the other hand, it had not compared these links with those of Spain, where the subsidiary companies operated, or of Belgium, of which the majority of shareholders were nationals. Diplomatic protection was based on the idea that the State of nationality was specially affected by the harm caused or likely to be caused to an individual. It was not an institution designed to allow States to assert claims on behalf of individuals, in general but on behalf of the State's own nationals. The existence of a genuine link between the individual and a State other than the State of nationality was an objection that a State could raise if it wanted to, irrespective of whether such a stronger link existed with that State itself. If there was no genuine link, the State of nationality was not specially affected.

59. It was said that article 5 was closely related to article 3 and set out the definition of a national, rather than of the State of nationality. The criteria for granting nationality - birth, descent or naturalization - were appropriate and generally accepted. Just one of those criteria was enough to establish an effective link between the State of nationality and its national, even if the national habitually resided in another State. With regard to habitual residence it was said that



some writers drew a distinction between involuntary and voluntary naturalization, depending on whether a nationality was acquired by adoption, legitimation, recognition, marriage or some other means. Naturalization itself, even when limited by the Special Rapporteur to bona fide naturalization, remained a very broad concept, which assumed different forms based on different grounds. Among those grounds, habitual residence often played an important role, albeit generally in combination with other connecting factors.

60. The “bona fide” criterion, however, was considered by some members to be subjective and consequently difficult to apply. It was pointed out that the requirement of “bona fide” would place the onus of proof of bad faith on the respondent State and that would be unfair. Instead, it would be preferable to use the words “valid naturalization”, as had been done in the *Flegenheimer* case. It was further suggested that the article might be shortened by deleting references to the words “by birth, descent or by bona fide naturalization”. Others suggested that these words be retained but that the phrase “in accordance with international law” be added to qualify naturalization. This was unacceptable to some members who argued that the retention of any reference to the methods of granting of nationality questioned the discretion of the State to confer nationality in accordance with its national laws.

61. It was further stated that the listing of the requirements for the acquisition of nationality in article 5, as opposed to article 1, gave the impression that a State’s right to grant nationality was being questioned and that States were not entitled to grant nationality on what were not bona fide grounds. It was stressed that what was in issue was opposability rather than nationality. Viewed in this light, the question of bona fide nationality, the *Nottebohm* case and other issues fell into place. The *Nottebohm* case was not about the right of a State to grant nationality but about the right of Liechtenstein to file a claim against Guatemala. Hence, according to this view, paragraphs 97, 98, 101 and 102 of the report of the Special Rapporteur, should be discussed in the context of opposability rather than that of a State’s right to grant nationality, which was virtually absolute. Consequently, the conclusion drawn in paragraph 120 of the report of the Special Rapporteur should be modified accordingly.

62. The comment was also made that the statement in paragraph 117 of the report to the effect that the genuine link requirement proposed by *Nottebohm* seriously undermined the traditional doctrine of diplomatic protection was over stated. On the contrary, as long as an individual had the nationality of a State, on the basis of one of the criteria in question, the door was open for the exercise of diplomatic protection by that State. In addition, the statement in

paragraph 104 of the report of the Special Rapporteur that nationality was not recognized in the case of forced naturalization while pertinent, appeared not to take account of State succession, an institution which accorded to the successor State the right to grant its nationality *en masse* and in an authoritarian manner, even to persons who held the nationality of the predecessor State and whose habitual residence was in the territory of the State that was the subject of the succession. It was an important exception and was recognized in international law on the same grounds as voluntary naturalization.

63. Some members of the Commission expressed the view that it would be difficult to discuss article 5 in the absence of reference to the questions of denial of justice and the exhaustion of local remedies. For an injury to be attributable to a State, there must be denial of justice, i.e. there must be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started.

64. It was suggested that it was preferable for the draft articles to deal exclusively with the treatment of natural persons. Legal persons should be excluded from this study given the obvious difficulties in determining their nationality, which might be that of the State where a legal person had its headquarters or was registered, that of its stockholders or perhaps even that of the main decision-making centre.

65. Other members of the Commission, however, did not agree with the inclusion of denial of justice in the text since it would involve dealing with primary rules and the Commission had already decided to limit the scope of the consideration of the topic to secondary rules. With regard to the question of whether the topic should be limited to natural persons, some members of the Commission felt that issue should not be foreclosed at this time; taking into account the expansion of international trade, nationals in need of diplomatic protection would be shareholders of companies, etc.

(c) Concluding remarks by the Special Rapporteur

66. The Special Rapporteur stated that, as many members of the Commission had emphasized, the topic under consideration dealt with diplomatic protection, and not acquisition of nationality. Article 5 perhaps failed to make that distinction clearly enough. The real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere. What was involved was a challenge to the right of a State to

protect a national, not the circumstances in which a State could grant nationality. Opposability of nationality came into play and that should be addressed in the redrafting of the article. He agreed with the suggestion to redraft article 5 to remove references to birth, descent and naturalization. Objections had been raised to the use of the term “bad faith”, and that, too, was a question of drafting. Thus, although many suggestions had been made on how to improve article 5, no one had questioned the need for such a provision. With regard to the requirement of exhaustion of local remedies, the Special Rapporteur agreed that it was a matter that must be dealt with in the work on diplomatic protection, even if it was also being addressed under the topic of State responsibility.

## 7. Article 6<sup>13</sup>

### (a) Introduction of article 6 by the Special Rapporteur

67. Article 6 dealt with dual or multiple nationality, which was a fact of international life, even if all States did not recognize it. The question was whether one State of nationality could exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings were divided on the subject, as demonstrated in the report (paras. 122 to 159), but the most recent sources seemed to support the rule advocated in article 6: subject to certain conditions, a State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual’s dominant nationality was that of the first State. The criterion of dominant or effective nationality was important and courts were required to consider carefully whether the person concerned had closer links with one State than with another.

### (b) Summary of the debate

68. Different views were expressed in respect of article 6. Some members supported the principle of the article and the inclusion of a reference to “dominant and effective” nationality. Some had difficulties with the core proposition of the article. While yet other members expressed views in regard to specific aspects of the formulation of the article.

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<sup>13</sup> Article 6 reads as follows:

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s [dominant] [effective] nationality is that of the former State.

69. Some members declared that notwithstanding the classical rule of the non-responsibility of the State in respect of its own nationals, article 6 should be endorsed for the reasons given by the Special Rapporteur in the report. Although, as pointed out in paragraph 153, there might be problems in determining the issue of effective or dominant nationality, it was nevertheless possible to do so. As between two States of nationality, the claimant State would in practice carry the day if the balance of nationality was manifestly in its favour. Any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State should be resolved in favour of the respondent State.

70. It was noted that “dominant” nationality and “effective” nationality were treated in the case law as interchangeable. Some preference was expressed for the concept of “dominant nationality” because it implied that one of the two nationality links was stronger than the other. The expression “effective nationality”, on the other hand, could mean that neither of the links of nationality would suffice to establish the right of a State to exercise diplomatic protection. In the case of a person having dual nationality, for example, it could be maintained that neither of the links of nationality was effective. It would then follow that neither State could exercise diplomatic protection. The Special Rapporteur said that he supported the members who preferred the word “dominant” rather than the word “effective” because it was a question of comparing the respective links that an individual had with one State or another. However, he did not fully endorse the reasons given for that preference because nationality acquired through birth might well be effective nationality: it depended on how far the meaning of the word “effective” was to be stretched.

71. It was noted that article 6 dealt with the complex issue of the implications of multiple nationality for the right to exercise diplomatic protection. The Special Rapporteur was prepared to recognize the right of the State of nationality of an injured person to exercise diplomatic protection on his or her behalf vis-à-vis another State of nationality of the same person on condition that the nationality of the State exercising the protection was of a dominant or effective character. It was not easy to reach that conclusion because the starting point for the analysis - article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws - was opposed to this view, since it stated that “A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses”. Even today, that principle continued to have its supporters.

72. However, as shown by the Special Rapporteur, the development of the principle of dominant or effective nationality had been accompanied by a significant change in approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions, ranging from the *Nottebohm* case to the jurisprudence of the Iran-United States Claims Tribunal, of the application of the principle of dominant or effective nationality in cases of dual nationality. His conclusion in paragraph 160 of the report was that “[t]he principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the State of which they are nationals”. However, the situation was not so simple. First, “developments in international human rights law” had thus far stemmed exclusively from treaty rules and were of limited scope, since they concerned only States that were bound by those rules and the rights and freedoms they established. Furthermore, as the Special Rapporteur indicated himself in paragraph 146 of his report, jurists were divided on the applicability of the principle of dominant nationality. It was stated that while States were now more tolerant of multiple nationality than 30 to 50 years ago, many still incorporated in their internal legislation the rule contained in article 3 of the 1930 Hague Convention, namely, that “a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses”. And it seemed that States, even now, were not eager to waive that right. Notwithstanding the *Nottebohm* case, which continued to be perceived as the fundamental point of reference, the principle of the sovereign equality of States continued to enjoy strong support. In cases in which dual nationality was well established, any indiscriminate application of the principle of dominant or effective nationality could have absurd implications and might undermine State sovereignty. In addition, dual nationality conferred a number of advantages on those who held two nationalities and the question was raised why they should not suffer disadvantages as well.

73. It was pointed out that the problem posed by article 6 was complex because many States insisted that their nationals retain their nationality of origin, even when they subsequently acquired another nationality. That implied that the State of origin (i.e. the first State of nationality) retained the power to exercise diplomatic protection on behalf of one of its nationals

vis-à-vis the State whose nationality that national had acquired (the second State of nationality). It would be better for the Commission to confine itself to the principle set out in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, article 4 of which provided that “a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses”. It was not legitimate for a dual national to be protected against a State to which it owed loyalty and fidelity.

74. It was stressed that the principle of dominant or effective nationality had its place in cases of dual nationality when diplomatic protection was exercised by one of the States of nationality of the person concerned against a third State. However, when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Furthermore, if draft article 6 was to be addressed in the context of the progressive development of international law, the key factor in determining whether a State of nationality could exercise diplomatic protection against another State of nationality should not be the dominant nationality of the claimant State, but, rather, the lack of a genuine and effective link between the person concerned and the respondent State.

(c) Special Rapporteur’s concluding remarks

75. The Special Rapporteur acknowledged that article 6 presented great difficulties and had created a clear division of opinion. He agreed it would be more appropriately placed after article 7. He did not, unlike some members, see it as a clear case of progressive development of international law. Two points of view existed, both backed by strong authority, and it was for the Commission to make a choice between the competing principles. He stressed that many States did not allow a national to denounce or lose his or her nationality. Cases might occur in which a person had relinquished all ties with the State of nationality and acquired the nationality of another State yet was formally bound by a link of nationality with the State of origin. It would mean that, if the individual was injured by the State of origin, the second State of nationality could not provide protection. Clearly, the draft must contain a provision covering the material in article 6.

8. Article 7<sup>14</sup>

(a) Introduction by the Special Rapporteur

76. The Special Rapporteur stated that article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual. It was a compromise rule, against a background of differing opinions, backed up by the decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission.

(b) Summary of the debate

77. Many members in principle supported article 7. The view was expressed that article 7, paragraph 1, merely reflected the contents of article 5 without adding anything more. Support was expressed for the Special Rapporteur's view that the effective or dominant nationality principle did not apply where one State of nationality sought to protect a dual national against another State of which he was not a national. Support was further expressed for the proposition in paragraph 170 of the report of the Special Rapporteur that the conflict over the requirement of an effective link in cases of dual nationality involving third States was best resolved by requiring the claimant State only to show that a bona fide link of nationality existed between it and the injured person.

78. Concern was, however, expressed that the Special Rapporteur seemed to reject the principle of dominant or effective nationality that he had sought to apply in article 6. In paragraph 173 of his report, the Special Rapporteur recognized that the respondent State was entitled to raise objections where the nationality of the claimant State had been acquired in bad faith. According to this view, the bona fide link of nationality could not totally supplant the

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<sup>14</sup> Article 7 reads as follows:

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.
2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

principle of dominant or effective nationality as set forth in article 5 of the 1930 Hague Convention and confirmed by subsequent jurisprudence, including the *Nottebohm* judgment. Of course, the question arose as to whether the concept of bona fides should be interpreted in broad or narrow terms in the context of this article. The Special Rapporteur, however, appeared to have adopted a strictly formal approach to nationality, without considering whether an effective link existed between the person concerned and the States in question. On that point, according to this view, while the principle of dominant nationality might well be set aside, an escape clause should nevertheless be inserted in article 7 to prevent the article from being used by a State to exercise diplomatic protection on behalf of a person of multiple nationality with whom it had no effective link.

79. With regard to paragraph 2, the comment was made that the concept of joint exercise of diplomatic protection by two or more States of nationality was acceptable. Nevertheless, provision should be made, in either article 7 or the commentary, for the possibility of two States of nationality exercising diplomatic protection simultaneously but separately against a third State on behalf of a dual national. In such a case, the third State must be able to demand the application of the dominant nationality principle in order to deny one of the claimant States the right to diplomatic protection. Difficulties might also arise if one State of nationality waived its right to exercise diplomatic protection or declared itself satisfied by the response of the responding State, while the other State continued with its claim.

(c) Concluding remarks by the Special Rapporteur

80. The Special Rapporteur noted that there was widespread support for article 7, some helpful drafting suggestions had been made and the principle set out in the article had not been seriously questioned.



9. Article 8<sup>15</sup>

(a) Introduction by the Special Rapporteur

81. The Special Rapporteur stated that the rule set out in article 8, which concerned the exercise of diplomatic protection on behalf of stateless persons and refugees, was an instance of the progressive development of international law. It clearly departed from the traditional position stated in the *Dickson Car Wheel Company v. United Mexican States*. A number of conventions had been adopted on stateless persons and refugees, particularly since the Second World War, but they did not deal with the question of diplomatic protection. Many writers had suggested that that was an oversight which should be remedied because some State must be in a position to protect refugees and stateless persons. The appropriate State was the State of residence, given that residence was an important aspect of the individual's relationship with the State, as demonstrated by the jurisprudence of the Iran-United States Claims Tribunal. The question remained whether the Commission was ready to follow that course, even though practice and jurisprudence on the subject were non-existent.

(b) Summary of the discussion

82. It was generally agreed that article 8 represented progressive development of international law. But such a progressive development of international law was warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. Article 8 reaffirmed the role of the institution of diplomatic protection in achieving a basic goal of international law, that of civilized co-existence based on justice, and demonstrated in exemplary fashion how the Commission could, at the right time and in an appropriate context, fulfil one of its primary tasks, that of the progressive development of international law. The problem of the protection of stateless persons and refugees was extremely pertinent, for people in those categories numbered many millions worldwide. It was suggested

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<sup>15</sup> Article 8 proposed by the Special Rapporteur reads as follows:

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

See *ibid.*, p. 57.

that there were alternatives to nationality that should be taken into account in particular circumstances, and the case of refugees and stateless persons was certainly something that demanded careful consideration. It was necessary to see whether a parallel with nationality could be drawn when habitual residence was involved.

83. Some members, however, questioned the validity of article 8. According to this view, although human rights conventions afforded stateless persons and refugees some protection, most States of residence did not intend to extend diplomatic protection to those two groups. A number of judicial decisions stressed that a State could not commit an internationally wrongful act against a stateless person, and consequently, no State was empowered to intervene or enter a claim on his/her behalf. The 1951 Convention relating to the Status of Refugees made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic and consular authorities of the country of issue, nor did it confer on those authorities the right of protection. The 1961 Convention on the Reduction of Statelessness was silent on the subject of protection. In spite of the developments in recent years relating to the protection of refugees and stateless persons, the time did not yet seem ripe to address the question of diplomatic protection for such persons.

84. Some members expressed concern about article 8 if diplomatic protection was to be considered the right of an individual vis-à-vis the State entitled to accord him or her diplomatic protection, since that would impose an additional burden on States of asylum or States hosting refugees and stateless persons. The problem in connection with the protection of refugees was that the better could become the enemy of the good. If States believed that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. Refugee status in the classical sense of the term was an extremely important weapon for the protection of individuals against persecution or well-founded fear of persecution. If the Commission overloaded the burden, the serious difficulties that already existed in maintaining the classical system would be exacerbated. However, if diplomatic protection was to be conceived as being at the discretion of the State and not as the right of the individual, then the article, with some modification relating to the conditions under which such protection might be exercised, would be more acceptable to these members. Some members, while sympathizing with those who had expressed fears that the option offered to host States might, in practice, turn

into a burden, nevertheless felt that States of residence should not be denied the right to exercise diplomatic protection on behalf of stateless persons or refugees on their territory. Such a right might not be exercised very frequently, but it should not be generally withheld. Subject to dividing article 8 into two separate provisions dealing with stateless persons and refugees respectively, these members were in favour of maintaining the Special Rapporteur's text.

85. It was stressed by one speaker that when a host State felt compelled by moral or practical considerations to sponsor the claims of persons in its territory, vis-à-vis third States, such action could not be viewed as a legal duty but as a discretionary course of action. This member was confident that the Special Rapporteur had at no stage suggested that the granting of refugee status was the penultimate step in the process of granting a right of nationality. A State could, for humanitarian reasons, espouse certain claims of refugees, placing them on the same footing as nationals, because there was no one else to take up their cause.

86. With regard to the issue of residence, some members found it useful to require that the refugee or the stateless person must have been residing for a certain period of time in the host country before requesting diplomatic protection. Other members, however, preferred the requirement of "effective link".

87. With regard to the question whether the State of residence of the refugee might exercise diplomatic protection against the State of nationality of the refugee, views differed. It was noted, in this connection, that the United Nations High Commissioner for Refugees was the "protecting" authority for refugees and could take up complaints on behalf of refugees with the Government of the country concerned. If international organizations could exercise functional protection in respect of their personnel, there was no reason why the UNHCR could not do likewise for refugees under their "protection". That would reduce the burden on host States, which were, for the most part, developing countries faced with acute problems arising from refugees, affecting their economic life, and also their environment and public order. Other members did not share this view and believed that while diplomatic protection should not be exercised against the State of nationality of the refugee in respect of claims relating to matters arising prior to granting refugee status, there should be no hesitation with regard to claims arising after refugees were granted such status.

(c) Concluding remarks by the Special Rapporteur

88. Article 8 was clearly an exercise in the progressive development of international law and an overwhelming majority of members had expressed support for it. The objections raised were

not really well founded. First, the host State reserved the right to exercise diplomatic protection and thus had a discretion in the matter. Second, there was no suggestion that the State in which the individual had obtained asylum could bring an action against the State of origin. That was made very plain in paragraphs 183 and 184 of his report, although it could perhaps be made clearer in the article itself. Third, the provision was not likely to be abused: stateless persons and refugees residing within a particular State were unlikely to travel abroad very often, as the State of residence would be required to give them travel documents, something that in practice was not done frequently. Only when a person used such documents and had suffered injury in a third State other than the State of origin would diplomatic protection need to be exercised. A number of suggestions for improvements had been made, including the suggestion that the article should be split into one part on stateless persons and another on refugees.

#### 10. Report of the Informal Consultations

89. At its 2624th meeting, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on articles 1, 3 and 6. The report of the Informal Consultations is reproduced below:

- A. Most of the discussions, in Informal Consultations, focused on article 1 which seeks to describe the scope of the study.
  1. It was agreed that article 1 should not include reference to denial of justice and that no attempt would be made to draft a substantive provision on this subject as it is essentially a primary rule. On the other hand, it was agreed that denial of justice should be mentioned as an example of an internationally wrongful act in the commentary to article 1. Moreover, it was stressed that elements of the concept should be considered in the provision on exhaustion of local remedies.
  2. It was agreed that there should not be an exclusionary clause attached to article 1. On the other hand, the commentary should make it clear that the draft articles would not cover the following issues:
    - (a) functional protection by international organizations;
    - (b) the protection of diplomats, consuls and other State officials acting in their official capacity;
    - (c) diplomatic and consular immunities;
    - (d) the promotion of a national's interest not made under a claim of right.

3. It was agreed that the draft articles would – at this stage – endeavour to cover the protection of both natural and legal persons. Consequently, article 1 would simply refer to “national”, a term wide enough to include both types of persons. The protection of legal persons does, however, raise special problems and it is accepted that the Commission might at a later stage wish to reconsider the question whether to include the protection of legal persons.

4. It was suggested that the inclusion of a reference to “peaceful” procedures in article 1 might obviate the need for an express prohibition on the use of force (see article 1 below).

It is recommended that the following options for article 1, reflecting the discussions that took place in the Informal Consultations, should be considered by the Drafting Committee.

#### OPTION ONE

(1) Diplomatic protection means a procedure taken by one State in respect of another State involving diplomatic action or judicial proceedings [or other means of peaceful dispute settlement?] [within the limits of international law?] in respect of an injury to a national caused by an internationally wrongful act attributable to the latter State.

(2) In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

#### OPTION TWO

Diplomatic procedure is a process in which a State takes up the claim of its national, etc. etc. [thereafter substantially the same as Option one].

#### OPTION THREE

(1) Diplomatic protection is a process involving diplomatic or judicial action [or other means of peaceful dispute settlement] by which a State asserts rights on behalf of its nationals at the international level for injury caused to the national by an internationally wrongful act of another State vis-à-vis that State.

B. Article 3 gave rise to little debate. It is therefore recommended that the following article be referred to the Drafting Committee.

The State of nationality has the right [is entitled?] to exercise diplomatic protection on behalf of a national [or non-national as defined in article 8] injured by an internationally wrongful act on the part of another State.

It was suggested that a reaffirmation of the right of a State to exercise diplomatic protection might be construed as an endorsement of the absolute discretion of the State to grant or refuse protection to a national. This would undermine efforts in municipal law to oblige States to exercise diplomatic protection on behalf of a national. Hence the phrase word “entitled” instead of “right”.

C. Article 6 was referred to informal consultations in order to resolve the division of opinion in the Commission on the question whether the dominant or effective State of nationality might exercise diplomatic protection vis-à-vis another State of nationality. The informal consultation group recognized that the “sources speak with mixed voices” but accepted that article 6 accorded with current trends in international law. It was, however, agreed that the Drafting Committee should consider including safeguards against an abuse of the principle contained in article 6. This might be done by

1. according greater prominence to the qualification contained in article 9 (4) insofar as it affects article 6;
2. emphasizing that the national should not have an effective link with the respondent State; and
3. including a definition of the term “dominant” or “effective” nationality in a separate provision.

It is recommended that article 6 be referred to the Drafting Committee.

#### Article 6

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s [dominant] [effective] nationality is that of the former State.

#### Article 9 (4)

Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State.

D. No objections were raised to the referral of articles 5, 7 and 8 to the Drafting Committee. It is therefore recommended that articles 1, 3, 5, 6, 7 and 8 be referred to the Drafting Committee.

90. The Commission considered the report of the Informal Consultations at its 2635th meeting and decided at the same meeting to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultations.

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